United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P–02–158 OF 1994
SHAIK DAUD, GOPAL SRI RAM AND SITI NORMA YAAKOB JJCA
27 JUNE 1995

Companies and Corporations *— Winding-up — Service of petition — Change of registered address — Particulars of change not entered in register, whether relevant — Whether notice of change effective before notification of change was entered in register — No evidence to contradict date of lodgement — Whether service at old registered address bad*

Companies and Corporations *— Winding-up — Statutory demand — Bankruptcy principles not applicable to winding-up cases — Whether petitioner must quantify exact amount due from respondent — Companies Act 1965 s 218(2)(a)*

The Penang High Court ordered that the winding-up order made in default of appearance against the respondent company be set aside solely on the ground that the statutory notice under s 218 of the Companies Act 1965 was defective as the petitioner had not quantified the exact amount due from the respondent. The learned judge applied principles decided in bankruptcy cases to the winding-up proceedings. Hence, this appeal to the Court of Appeal. During the appeal, learned counsel for the respondent raised one issue which he failed to raise in the lower court, ie that the winding-up petition served on 26 February 1992 at the respondent's old registered address was bad in law. The notice of change of address dated 31 December 1991 was lodged with the Registrar of Companies on 1 February 1992. No affidavit was filed on behalf of the appellant to contradict this.

Held, dismissing the appeal with costs:

(1) In a statutory notice under s 218 of the Companies Act 1965, the petitioner need not quantify the exact amount due from the respondent (see p 674B–C); *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325 followed.

(2) The learned judge ought not apply principles enunciated in bankruptcy cases, in cases of winding-up. Bankruptcy cases are governed by their own Act and company winding-up cases are governed by an entirely different set of Act and regulations (see p 674H–I).

(3) Section 218(2)(a) of the Companies Act 1965 refers to a 'demand' unlike s 3(1)(i) of the Bankruptcy Act 1965 which specifically mentions the words 'bankruptcy notice'. The demand stipulated is merely a warning to the creditor that if after three

A weeks he fails to pay, a winding-up petition would follow. Therefore, the demand need not exactly quantify the amount unlike in the bankruptcy notice. Unlike a bankruptcy notice, there is no prescribed form of the statutory demand or notice as the whole object of the demand is to warn the debtor of an impending petition. The failure to quantify does not render the demand of its real purport and objective (see p 675E–F).

(4) In order for the demand to be effective, it must comply strictly with certain requirements as stipulated in s 218(2)(a). The requirements are that the demand must be in writing under the hand of the creditor or his authorized agent and it must specify the sum due. The demand must be served on the company by leaving it at the registered office. No mention is made of quantifying it to the last cent (see p 675H–I).

(5) By virtue of r 5 of the Rules of the Court of Appeal 1994, an appeal to the Court of Appeal shall be by way of re-hearing. Therefore, the court was competent to consider the new issue of service of the winding-up petition although it was not raised earlier (see p 676F).

(6) Service of the petition on the old address must be bad in law. The fact that the particulars of the change had not been entered in the register was no concern of the respondent and was irrelevant. Once the notice of change under s 120 of the Companies Act 1965 had been lodged, that should be the effective date even though the notification of the change was entered in the register much later. Futhermore, there was no affidavit filed on behalf of the appellant to contradict the date of the lodgement (see p 677G–I); *Summit Co (M) Sdn Bhd v Nokko Products (M) Sdn Bhd* [1985] 1 MLJ 68 followed.

[Bahasa Malaysia summary

Mahkamah Tinggi Pulau Pinang telah memerintahkan bahawa perintah penggulungan yang dibuat dalam keingkaran kehadiran terhadap syarikat responden hendaklah diketepikan semata-mata atas alasan bahawa notis berkanun di bawah s 218 Akta Syarikat 1965 tidak sempurna kerana pempetisyen tidak menghitungkan jumlah tepat yang perlu dibayar oleh responden. Hakim yang arif telah memakai prinsip-prinsip yang diputuskan dalam kes-kes kebankrapan kepada prosiding penggulungan. Maka rayuan ini kepada Mahkamah Rayuan. Ketika rayuan tersebut, peguam yang arif bagi pihak responden telah membangkitkan satu isu yang telah gagal dibangkitkan oleh beliau di dalam mahkamah rendah, iaitu bahawa petisyen penggulungan yang disampaikan pada 26 Februari 1992 di alamat berdaftar responden yang lama adalah tidak wajar di sisi undang-undang. Notis penukaran alamat bertarikh 31 Disember 1991 telah dibuat dengan Pendaftar Syarikat pada 1 Februari 1992.

Tiada afidavit yang telah difailkan bagi pihak perayu untuk menyangkal perkara ini. A

Diputuskan, menolak rayuan dengan kos:

(1) Dalam sesuatu notis berkanun di bawah s 218 Akta Syarikat 1965, pempetisyen tidak perlu menghitung jumlah tepat yang kena dibayar oleh responden (lihat ms 674B–C); *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325 diikut. B

(2) Hakim yang arif tidak sepatutnya memakai prinsip-prinsip yang disebut dalam kes-kes kebankrapan, dalam kes-kes penggulungan. Kes-kes kebankrapan dikuasai oleh Aktanya sendiri dan kes-kes penggulungan syarikat dikuasai oleh Akta dan peraturan-peraturan yang berlainan sama sekali (lihat ms 674H–I). C

(3) Seksyen 218(2)(a) Akta Syarikat 1965 merujuk kepada 'tuntutan' tidak seperti s 3(1)(i) Akta Kebankrapan 1965 yang secara khususnya menyebut perkataan-perkataan 'notis kebankrapan'. Tuntutan yang ditetapkan adalah semata-mata satu amaran kepada pemiutang bahawa jika selepas tiga minggu, beliau gagal untuk membayar, satu petisyen penggulungan akan disusuli. Oleh itu, tuntutan tersebut tidak perlu menghitungkan jumlah tidak seperti di dalam notis kebankrapan. Bukan seperti notis kebankrapan, tidak terdapat borang yang ditetapkan bagi tuntutan berkanun atau notis kerana keseluruhan matlamat tuntutan adalah untuk memberi amaran kepada penghutang mengenai satu petisyen yang akan dilaksanakan. Kegagalan untuk menghitung tidak memberikan tuntutan tersebut maksud dan objektifnya yang sebenarnya. (lihat ms 675E–F). D E F

(4) Supaya tuntutan itu berkesan, ia mestilah mematuhi dengan tegasnya syarat-syarat yang tertentu seperti mana yang ditetapkan di dalam s 218(2)(a). Syarat-syaratnya adalah bahawa tuntutan tersebut mestilah secara bertulis oleh pemiutang atau ejennya yang dibenarkan dan ia mestilah menentukan jumlah yang kena dibayar. Tuntutan tersebut mestilah disampaikan ke atas syarikat tersebut dengan meninggalkannya di alamat pejabat berdaftarnya. Hitungan sehingga ke sen yang terakhir tidak disebut (lihat ms 675H–I); G H

(5) Menurut k 5 Kaedah-Kaedah Mahkamah Rayuan 1994, sesuatu Rayuan kepada Mahkamah Rayuan hendaklah melalui perbicaraan semula. Oleh itu, mahkamah tersebut adalah kompeten untuk mempertimbangkan isu penyampaian yang baru bagi petisyen penggulungan walaupun ia tidak dibangkitkan pada awalnya (lihat ms 676F). I

(6) Penyampaian petisyen di alamat yang lama semestinya tidak betul di sisi undang-undang. Hakikat bahawa butir-butir

penukaran masih belum dimasukkan ke dalam daftar tidak menjadi hal kepada responden dan adalah tidak relevan. Sebaik sahaja notis penukaran di bawah s 120 Akta Syarikat 1965 telah dibuat, itulah yang seharusnya menjadi tarikh yang berkesan meskipun pemberitahuan penukaran tersebut telah dimasukkan di dalam daftar kemudiannya. Lagipun tiada afidavit yang telah difailkan bagi pihak perayu yang bercanggah dengan tarikh penyerahsimpanan (lihat ms 677G–I); *Summit Co (M) Sdn Bhd v Nokko Products (M) Sdn Bhd* [1985] 1 MLJ 68 diikut.]

Notes

For notes on statutory demand for winding-up, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 786–787, 892–893.

For notes on service of winding-up petition, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 885–886.

Cases referred to

Bateman Television Ltd & Anor v Coleridge Finance Co Ltd [1969] NZLR 794 (refd)

Fawzia bte Osman v Bank Bumiputra (M) Bhd & another appeal [1991] 1 MLJ 426 (refd)

Lim Boon Peng v United Orient Leasing Co Bhd [1991] 1 MLJ 292 (refd)

Low Mun v Chung Khiaw Bank Ltd [1988] 1 MLJ 263 (refd)

PT Pelajaran Nasional Indonesia v Joo Seang & Co Ltd [1958] 24 MLJ 113 (refd)

Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1991] 3 MLJ 325 (folld)

Summit Co (M) Sdn Bhd v Nokko Products (M) Sdn Bhd [1985] 1 MLJ 68 (folld)

Legislation referred to

Bankruptcy Act 1967 s 3(1)(i)
Bankruptcy Act 1967 (Amendment A827)
Bankruptcy Rules 1969
Companies Act 1965 ss 218, (2)(a)
Companies (Winding Up) Rules 1972 r 25
Rules of the Court of Appeal 1994 r 5

Appeal from: Company Winding Up No 28–38 of 1991 (High Court, Pulau Pinang)

Asbir Kaur (Asbir, Hira Singh & Co) for the appellant.
Teja Singh (Teja Singh Penesar & Co) for the respondent.

Shaik Daud JCA (delivering judgment of the court): This is an appeal from the decision of the Penang High Court whereby a winding up order made in default of appearance against the respondent company was ordered to be set aside pursuant to an application by the respondent. The winding up order was set aside solely on the ground that the statutory notice under s 218 of the Companies Act 1965 was held to be defective. The learned judge at first instance held that the sum required to be paid in the notice issued by the petitioners dated 25 October 1991 was ambiguous and uncertain as the petitions had failed to quantify it. He was of the view that the statutory notice under s 218 dated 25 October 1991 contained what he described as 'the offending words', ie 'interest of RM64.69 per day from 26 October 1991 till date of full settlement.'

He came to the conclusion that the above phrase in the notice was ambiguous and uncertain as the petitioner has not quantified the exact amount due from the respondent. On reading through the grounds of judgment of the learned judge it seems quite clear that the learned judge solely relied and followed the decision in the then Supreme Court case of *Fawzia bte Osman v Bank Bumiputra (M) Bhd & another appeal* [1991] 1 MLJ 426. In delivering the decision of the court, Mohamed Azmi SCJ referred to two other cases, namely, *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 and *Lim Boon Peng v United Orient Leasing Co Bhd* [1991] 1 MLJ 292; and following both decisions said at p 427:

> Since the debtor is entitled to know exactly the actual sum that he has to pay to avoid the commission of the act of bankruptcy, it is essential that the notice must quantify the total sum required to be paid for the purpose of that particular bankruptcy notice. In these appeals, by leaving the amount at large 'to date of actual realisation' there is uncertainty in the actual amount due and payable which is required to be settled by the notice within seven days of service' and further on in the same page said:
>
> > 'All sums demanded to be paid should be capable of being made the subject of execution, which meant that the amount required to be paid in the notice must not only be due and payable at the date of the issue of the notice but also that the execution thereon had not been stayed. Thus, it is wrong to include in the notice any sum which is not yet due and payable by the debtor as at the date of the issue of the notice.'

The learned judge in the present case came to the conclusion that the same principle adopted in *Fawzia's* and the other two cases should be equally applicable to the present case. Now in going through the above three cited cases it can be seen immediately that all the three cases were cases involving bankruptcy proceedings under the Bankruptcy Act 1967 and the Bankruptcy Rules 1969. The present case, however, is a case of winding up of a company under the Companies Act 1965.

With respect, I am of the view that the learned judge ought not to apply principles enunciated in bankruptcy cases, in cases of winding up. Bankruptcy cases are governed by their own Act and company winding up cases are governed by an entirely different set of Act and regulations. While it cannot be gainsaid that the liquidation or winding up of a company has certain obvious affinities with the bankruptcy of an individual the courts

A should be careful not to stretch these affinities to such an extent that they lose sight of the fact that they may fall in danger of applying the law of bankruptcy to company winding up proceedings. It must be remembered that in a winding-up proceeding there is nothing corresponding to an act of bankruptcy. In my view it is because of this aspect of this act of bankruptcy that the courts adopt a strict view in construing a bankruptcy notice. As a B result of the Supreme Court decision in *Fawzia's* case, s 3(1)(i) of the Bankruptcy Act 1967 was amended by Act A827 with effect from 16 July 1992 to include the phrase 'with interest quantified up to the date of issue of the Bankruptcy Notice'. With this amendment the ambiguity and uncertainty earlier encountered by creditors came to an end.

C In the case of the liquidation or winding up of a company, s 218(2)(a) of the Companies Act 1965 provides that:

> (2) A company shall be deemed to be unable to pay its debts if —
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving the registered office *a demand* under his D hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; ... . (Emphasis added.)

E The demand stipulated in the sub-s (2)(a) above is commonly called a statutory notice or demand. It can be seen, therefore, that this section refers to a 'demand' unlike s 3(1)(i) of the Bankruptcy Act 1967 which specifically mentions the words 'Bankruptcy Notice'. It is my view that the demand stipulated in the Companies Act 1965 is merely a warning to the creditor that if after three weeks he fails to pay, a winding up petition would follow. F Therefore the demand need not exactly quantify the amount unlike in the Bankruptcy Notice. Unlike a Bankruptcy Notice there is no prescribed form of the statutory demand or notice as the whole object of the demand is to warn the debtor of an impending petition. See *Bateman Television Ltd & Anor v Coleridge Finance Co Ltd* [1969] NZLR 794 at p 803. The failure to quantify does not render the demand of its real purport and objective. The G provisions of s 218(2)(a) prescribe a simple method by which a creditor, to whom the company owes more than five hundred ringgit, can establish that the company is unable to pay its debts. In order for the demand to be effective, however, it must comply strictly with certain requirements as stipulated in the sub-section itself. The requirements are that the demand H must be in writing under the hand of the creditor or his authorised agent, it must specify the sum due (no mention is made of quantifying it to the last cent). The demand must be served on the company by leaving it at the registered office. If these requirements are met, I am of the view that the demand is valid and if after three weeks the company fails to pay the amount demanded then the law deems it to be unable to pay its debts whereupon a I winding up petition would follow.

In the Bankruptcy Act 1967, however, as for the sum due it is provided 'to pay the judgement debt or sum ordered to be paid in accordance with

the terms of the judgement or order with interest quantified up to the date of issue of the bankruptcy notice.' Now in the light of these wordings it is encumbent upon the creditor to quantify the exact amount. In the case of the demand under the Companies Act 1965, what is provided is simply 'is indebted in a sum exceeding five hundred ringgit then due'. In the light of these differences between the provisions in the Bankruptcy Act and the Companies Act I am of the view that the principles of law enunciated in one ought not to be applied to the other.

An authority closer to the facts of the present case and involving a company winding up was cited but found no favour with the learned judge. The case referred to is the *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325. In that case an appeal against an order of winding up of the appellant company was dismissed by the Supreme Court on a similar notice under s 218 of the Companies Act 1965 using similar expressions as in the present case. The learned judge was of the view that he ought not to follow that decision because it is distinguishable in that the issue of ambiguity and uncertainty of the statutory demand was not decided by the Supreme Court. With respect, I disagree. Not every issue in an appeal need be specifically decided before it could be followed. It could well be that the court found there was no ambiguity or uncertainty and therefore there was no need to make a specific decision on the issue. Be that as it may I am of the view that the Sri Hartamas case falls squarely on the facts of this case and therefore it would be more appropriate to follow it than *Fawzia*'s case.

In the circumstances of the present case, I hold that the learned judge erred in applying the principle enunciated in *Fawzia's* case to the present case. Be that as it may, learned counsel for the respondent raises one more issue which unfortunately he failed to raise in the lower court. Learned counsel for the appellant objected to this but I find no merits to the objection. By virtue of r 5 of the Rules of the Court of Appeal 1994 an appeal to this court shall be by way of re-hearing. Therefore this court is competent to consider this new issue. It is contended by learned counsel for the respondent that the service of the winding up petition on his client was irregular. He refers to r 25 of the Companies (Winding Up) Rules 1972 where it is specifically provided that every petition to wind up a company shall be served upon the company at the registered office of the company by leaving a copy with any member, officer, or servant of the company there or if no such member, officer or servant can be found by leaving a copy at the registered office or principal place of business. The law has therefore provided a specific mode of service and this mode has to be adopted failing which service shall not be deemed to have been effected. In *PT Pelajaran Nasional Indonesia v Joo Seang & Co Ltd* [1958] MLJ 113, the issue in dispute was the service of a writ on a company. Rigby J held that where the law provides a particular method or form of procedure for effecting service then those procedures must be strictly complied with and the courts would set aside a judgement obtained by default where the requirements have not been complied with. In that case the court found that the writ had not been served on the company at its registered office as required by the

A law and service was held to be bad and the judgement in default was set aside.

In the present case there is no dispute that the petition was served at 48 Rangoon Road, Penang on a Chinese person found thereat. According to the affidavit of one Chow Yen Kong the Manager of S & C Management
B Services Sdn Bhd dated 4 July 1994, who had been the Secretaries for the respondent company since June 1985, the company had moved out of the old registered address at 48 Rangoon Road Penang in late April 1991 to its new address at 731 Dato Keramat Road, Penang, and the notice of this change dated 31 December 1991 was lodged with the Registrar of Companies on 1 February 1992. In the light of this it is contended that the
C service of the petition on 26 February 1992 at the respondent's old registered address was bad in law. No affidavit was filed to contradict this.

In reply to this learned counsel for the appellant submits that an official search was made on 29 January 1992 and the registered address of the
D respondent was at 48 Rangoon Road and hence service was affected at that address. Therefore the service was good. In response to this learned counsel for the respondent refers the court to the case of *Summit Co (M) Sdn Bhd v Nokko Products (M) Sdn Bhd* [1985] 1 MLJ 68. In that case the appellant purported to serve a writ on 1 July 1982 on the respondent company at an address which they believed to be the registered address of the company .
E The respondent company had in fact changed its registered address and the change had been notified to the Registrar of Companies on 20 February 1982. The notification of change was not, however, entered into the register until 24 September 1992. When no appearance was entered to the writ the appellants obtained judgement in default and execution proceedings were taken. The respondents when they came to know of the writ subsequently
F applied to have the writ set aside. The High Court gave judgement for the respondent. On appeal the then Federal Court held that the effective date of the change of the registered address is the date of the lodgement of the notice to the Registrar of Companies, and the court held that the learned judge was correct in holding that there had been no service of the writ and
G set aside the judgement.

The facts of the *Summit* case is similar to the present case. The notice of change was lodged with the Registrar of Companies on 1 February 1992 and service of the petition was on 26 February 1992 at the old address. There was no affidavit filed on behalf of the appellant to contradict the date
H of the lodgement. Therefore following the decision in the *Summit* case, and this court is bound by that decision, service of the petition on the old address on 26 February 1992 must be bad in law. The fact that the particulars of the change had not been entered in the register is no concern of the respondent and is irrelevant. Once the notice of change under s 120 of the Companies Act 1965 had been lodged, this should be the effective
I date even though the notification of the change is entered in the register much later. In the circumstances of this case I hold that the service of the petition on the respondent company is bad in law. For this reason which

reason was never considered by the learned judge and for the earlier reasons pertaining to the statutory demand I would dismiss the appeal with costs. Deposit to go towards taxed costs.

Appeal dismissed with costs.

Reported by Moy Saw Han